IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-1125

A. Y. ALLEE, ET AL,

Appellants

v.

FRANCISCO MEDRANO, ET AL,

Appellees

ON DIRECT APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANTS

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INDEX

CITATIONS

CITATIONS—Continued

CITATIONS—Continued

CITATIONS—Continued

OTHER AUTHORITIES—Continued

PAGE

STATUTES AND RULES

OTHER AUTHORITIES—Continued

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OPINION BELOW

The opinion of the Three-Judge Court for the Southern District of Texas is reported at 347 F.Supp. 605 (1972). A copy of said opinion is printed in the Jurisdictional Statement filed by Appellant at page 33.

JURISDICTION

This suit was brought under the provisions of Title 28, United States Code, Sections 1343, 2201, 2202, 2281 and 2285 and Title 42, United States Code, Sections 1983 and 1985; and the First and Fourteenth Amendments to the Constitution of the United States in the United States District Court for the Southern District of Texas, seeking declaratory and injunctive relief in an attack on the constitutionality of certain state statutes, and an injunction was sought restraining the officers and officials from enforcing these statutes against Appellees and their class. The complaint also alleged that the Appellants, as state officials acting under color of state law, conspired and deprived Appellees of their civil rights, privileges and immunities protected by the laws and Constitution of the United States. A Three-Judge District Court was formed to hear this cause as provided for by 28 U.S.C. Section 2284. Final judgment of the Court was entered on December 4, 1972, which judgment held that part of Article 5154d of Vernon's Civil Statutes of the State of Texas and part of Article 5154f of Vernon's Civil Statutes of the State of Texas and portions of Articles 474, 482, and 439 of the Texas Penal Code were unconstitutional and granted an injunction against its enforcement by state officers, their successors, agents and employees. Notice of Appeal was mailed to that Court on December 18, 1972.

The jurisdiction of the Supreme Court to review the decision of the Three-Judge Court is conferred by 28 U.S.C. Sections 1253, 2101(a)(b) and 2281. The following cases sustained the jurisdiction of the Supreme Court to review the judgment of this case on direct appeal: *Florida Lime and Avacado Growers, Inc. v. Jacobson*, 362 U.S. 73 (1960); *Ness Produce Co. v. Short*, 263 F.Supp. 586 (D.C.

Or. 1966), affirmed at 385 U.S. 537 (1967). Probable jurisdiction was noted by the court on May 7, 1973.

STATUTES INVOLVED

As noted above, the Three-Judge District Court below held that part of Article 5154d of Vernon's Civil Statutes of the State of Texas and part of Article 5154f of Vernon's Civil Statutes of the State of Texas, and portions of Articles 474, 482, and 439 of the Texas Penal Code unconstitutional and granted an injunction against its enforcement by state officers.

The court declared and adjudged that Section I of Article 5154d of Vernon's Civil Statutes of the State of Texas, to the extent quoted below, was null and void. The said portion of the statute reads as follows:

> "Section 1. It shall be unlawful for any person, singly or in concert with others, to engage in picketing or any form of picketing activity that shall constitute mass picketing as herein defined.
>
> " 'Mass picketing,' as that term is used herein, shall mean any form of picketing in which:
>
> "1. There are more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets.
>
> "2. Pickets constitute or form any character of obstacle to the free ingress to and egress from any entrance to any premises being picketed or to any other premises, either by obstructing said free ingress or egress by their persons or by the placing of vehicles or other physical obstructions."

The Court declared and adjudged that Sections 1 and 2 of Article 5154f of Vernon's Civil Statutes of the State of Texas, to the extent quoted below, were null and void. The said portion of the statute reads as follows:

"Section 1. It shall be unlawful for any person or persons, or association of persons, or any labor union, incorporated or unincorporated, or the members or agents thereof, acting singly or in concert with others, to establish, call, participate in, aid or abet a secondary strike, or secondary picketing, or a secondary boycott, as those terms are defined herein.

"Section 2. * * *

"b. 'Secondary strike' shall mean a temporary stoppage of work by the concerted action of two or more employees of an employer where no labor dispute exists between the employer and such employees, and where such temporary stoppage results from a labor dispute to which such two or more employees are not parties.

* * *

"d. The term 'secondary picketing' shall mean the act of establishing a picket or pickets at or near the premises of any employer where no labor dispute, as that term is defined in this Act, exists between such employer and his employees.

"e. The term 'secondary boycott' shall include any combination, plan, agreement or compact entered into or any concerted action by two or more persons to cause injury or damage to any person, firm or corporation for whom they are not employees, by

"(1) Withholding patronage, labor or other beneficial business intercourse from such person, firm or corporation; or

"(2) Picketing such person, firm or corporation; or

* * *

"(4) Instigating or formenting a strike against such person, firm or corporation; or

"(5) Interfering with or attempting to prevent the free flow of commerce; or

"(6) By any other means causing or attempting to cause an employer with whom they have a labor dispute to inflict any damage or injury to an employer who is not a party to such labor dispute."

* * *

"h. The term 'labor dispute' is limited to and means any controversy between an employer and the majority of his employees concerning wages, hours or conditions of employment; provided that if any of the employees are members of a labor union, the controversy between such employer and a majority of the employees belonging to such union, concerning wages, hours or conditions of employment, shall be deemed, as to the employee members only of such union, a labor dispute within the meaning of this Act."

The Court declared and adjudged the following portion of Article 474 of the Texas Penal Code to be null and void and restrained its enforcement. Article 474 has since been amended, but it read in pertinent part at the time of the

events from which this litigation arose, as follows:

> "Whoever shall go into or near any public place, or . . . near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek . . . in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200)."

The Court declared and adjudged that Article 482 of the Texas Penal Code was null and void. Such statutes reads as follows:

> "Any person who shall in the presence of hearing of another curse or abuse such person, or use any violently abusive language to such person concerning him or any of his female relatives, under the circumstances reasonably calculated to provoke a breach of the peace, shall be fined not more than one hundred dollars."

The Court declared and adjudged that Article 439 of the Texas Penal Code was null and void. The said statute reads as follows:

> "An 'unlawful assembly' is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, as held by the court below, Section 1 of Article 5154d of Vernon's Civil Statutes of the State of Texas is unconstitutional because of impermissible broadness?

2. Whether, as held by the court below, Sections 1 and 2 of Article 5154f of Vernon's Civil Statutes of the State of Texas is unconstitutional because of impermissible broadness?

3. Whether, as held by the court below, Article 482 of the Texas Penal Code is inconstitutional because of impermissible broadness?

4. Whether, as held by the court below, Article 439 of the Texas Penal Code is unconstitutional because of impermissible broadness?

5. Whether the court below can properly order injunctive relief, as it did, against peace officers of the Texas Department of Public Safety and the law enforcement officials of Starr County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Cameron v. Johnson*, 390 U.S. 617 (1968), *Younger v. Harris*, 401 U.S. 37 (1971), and its companion cases, in reaching the conclusion that injunctive relief would lie in the present case?

STATEMENT OF THE CASE

The Valley Farm Workers Organizing Committee, AFL-CIO, instituted a strike from June, 1966 until June 1967, in an attempt to encourage the predominately Mexican-American farm workers in Starr County to join with the

union in organizing and forming a union. In pursuit of their directives, and according to union president Domingo Arredondo, the picketing occurred every day (except Sunday) until its further continuance was enjoined by the state district court. (Tr. Vol. I p. 273). In pursuit of their objectives, strikes were called; and picket lines, rallies, and demonstrations were employed to enlist non-union laborers in the common cause. By an unexplained coincidence, vandalism and destruction of property began in June of 1966 in Starr County. Sugar was poured in gas tanks, flats on tractors were caused by man-made objects, and theft of property was on the increase. (Tr. Vol. II p. 534).

The evidence in this cause does not in any manner reflect that the Appellants and other officials of the State of Texas have engaged in a massive conspiracy to deny Appellees their constitutionally protected right of free speech and to deprive them of rights, privileges, or immunities secured by the Constitution and laws of the United States. Appellees sought to dramatize some twenty or so incidents that occurred over a period of one year into an alleged plot. Because of the fear of a breakdown of the law enforcement, to a great extent because of a large number of strikers and relatively small number of law enforcement officers, Starr County officials made a strong appeal that the Texas Rangers be sent to preserve order and prevent bloodshed. (Tr. Vol. II p. 421).

It is contended and we do state that early in the summer of 1966, Deputy Sheriff Raul Pena assisted in the distribution of "La Verdad", a newspaper which was anti-union in nature. We do not attempt to excuse or explain Mr. Pena's conduct other than his statement that he was attempting to help his friend, the publisher, Mr. De La Paz. However, whether or not Pena was pro-union or

anti-union would not have any bearing on the issues of whether or not in truth and in fact Appellees were violating the laws of the State of Texas.

On October 12, 1966, Appellee Chandler was arrested and charged with violation of Penal Code, Article 474, disturbing the peace. According to Deputy Sheriff Raul Pena, a complaint had been received from one of the crew leaders to the effect that pickets had been bothering them and calling them names in the field. Pickets were using a loud speaker system and using foul language addressed to the workers in the field. (Tr. Vol. III p. 596). Pena ordered the strikers to disperse. Appellee Chandler refused to leave and charges of disturbing the peace were filed against him. (Tr. Vol. IV p. 595).

On October 24, 1966, union president Domingo Arredondo and others were arrested for obstructing the International Bridge by sitting down and locking arms across the bridge to prevent all traffic from going back and forth across the international boundary. (Tr. Vol. I. p. 284). At the courthouse Domingo Arredondo and those arrested were screaming and hollering in the courthouse until Deputy Sheriff Ellert told them to stop hollering in the courthouse. At that moment Domingo Arredondo jumped close to the deputy's ear and hollered as loud as he could "viva la huelga". At that moment the deputy shoved Arredondo back against the wall and reached for his gun although he did not pull out his gun. (Tr. Vol. III p. 690).

It is difficult to imagine law enforcement officers not having the authority to control persons under arrest. Deputy Ellert denies striking Arredondo. His version of the incident reflects Arredondo clearly could have been charged with violation of Article 474 V.A.P.C., disturbing

the peace, for yelling in the courthouse. It was not what he said, but the manner in which he said it.

On November 7, 1966, twenty or twenty-five persons were blocking the entrance to La Casita Farms, (Tr. Vol. II p. 519). Jim Rochester, foreman of La Casita Farms, got a radio call on the early hours of November 7, 1966, that there was trouble at the gate of La Casita Farms and he went to the gate and upon his arrival he saw a group of people blocking the entrance to the farm. Several buses full of workers were trying to get into the farm but were unable to do so because the union people were blocking the entrance. Rochester got in one of the buses and told the people to move out of the way as he was going to drive the bus through the gate. It was at this time that Magdaleno Dimas, a union leader, hollered "you son-of-a-bitch, you are not going to do that," and jumped up into the bus door. Dimas was forced to jump out of the bus and hollered back at Rochester "you son-of-a-bitch, I'll get you". (Tr. Vol. II p. 521). Rochester then drove the bus through the gate. Rochester was well aware of Dimas' reputation for violence and considered this threat to be of a serious nature. (Tr. Vol. II p. 522).

On November 28, 1966, Appellees and other union members and sympathizers held a rally on the grounds of the Starr County Courthouse. They placed the union strike flag to fly from the flag pole normally occupied by the flag of the United States of America. No attempt was made to obtain permission from the Sheriff's Office to use the courthouse or to hang union flags from the courthouse windows. No attempt was made by Appellees to secure permission from the county officials for use of such public property. In fact the activities of the Appellees indicate that they were attempting to intimidate the Starr County

officials and to run matters as they pleased. This instance reflects a total disregard for the public officials of Starr County as well as its public buildings. (Tr. Vol. III p. 598).

On December 28, 1966, members of the union were picketing at the entrance to La Casita Farms. Librado de la Cruz, a union member, struck and grabbed Manuel Balli as he was attempting to enter the main gate of La Casita Farms. Deputy Sheriff Roberto Pena attempted to arrest Librado de la Cruz for assault, but the crowd ganged up around him and grabbed Deputy Pena and would not let him go. Finally an agreement was made and Librado de la Cruz drove his pickup to the Sheriff's Office. (Tr. Vol III p. 666). Charges could have been leveled against those present for unlawful assembly, Penal Code violations, Article 439 and 449; for rioting; Articles 455, 457, 464; for mass picketing under Article 5154d, Vernon's Civil Statutes. It might be well to point out to the Court that Article 5154d also prohibits the interfering with ingress and egress.

On January 26, 1967, five members of the union using a loud speaker were soliciting employees of the Trophy Farms to join the union. The five union sympathizers were calling Augustine Lopez and Fredrico Pena and other workers by using "the foulest words known to that language in this area". Both Augustine Lopez and Fredrico Pena signed complaints. (Tr. Vol. I p. 78).

On January 26, 1967, five members of the union were arrested for using obscene language directed at workers at Trophy Farms. These five union members were placed in jail and other union members gathered around outside the jail in an evident attempt to intimindate the local law enforcement officials. This harassment by the union

members was done under the guise of holding a "prayer meeting" at the jail. The union members were talking back and forth to the prisoners in the jail on the third floor of the courthouse and Deputy Sheriff Raul Pena ordered them to disperse. This was in keeping with the requirements of Article 472 of the Texas Penal Code that a peace officer should order persons present at an unlawful assembly to disperse. Deputy Sheriff Pena said that he asked them what they were doing there to which they replied "we are praying, you son-of-a-bitch". (Tr. Vol. III p. 604). He then ordered them to disperse which they did with the exception of Padilla and Drake. Since they refused to leave they were placed under arrest. In any event, a gathering at the jail after hours and unauthorized contact with the prisoners by large group of noisy people could certainly legally be dispersed.

On February 1, 1967, union member Orendain and three other union members, together with two Catholic priests, Father Smith and Father Killion gathered together on La Casita property and called fifty or sixty workers who were in La Casita fields "scabs" in spanish in attempting to use a word that had "punch to it and an edge to it". They were arrested for disturbing the peace. (Tr. Vol. II p. 503, Vol. IV p. 771).

On May 11, 1967, union member Ismael Diaz and others were on their way to the Roma International bridge to picket. The automobile driven by the union members was stopped for traffic violations. In addition to driving without a license, Diaz was speeding up and passing the buses carrying the farm workers, and then slowing it down so that the bus could not proceed. He was, in fact, obstructing a public road. In this connection, he and all the persons in the automobile could have been arrested for

participating in this activity. (Tr. Vol. IV p. 901-905).

After leaving the Roma International bridge the union sympathizers went to the Rio Grande City International Bridge which consists of only two lanes, one lane entering the bridge and the other leaving. There is not enough room to stand in the road without blocking traffic. According to the testimony of the Rangers, union members were unlawfully assembled at the bridge in violation of Articles 439 and 449, attempting to stop traffic, but moved back when ordered to do so and no charges were filed. (Tr. Vol. IV. p 905-908).

On May 12, 1967, Eugene Nelson, a union leader went to the Sheriff's Office for the express purpose of intimidating the Rangers and other law enforcement officers. He asked to see that "son-of-a-bitch, Captain Allee" and then stated "you tell that son-of-a-bitch that get man off my man because there's going to be some rangers killed". (Tr. Vol. III p. 674). Both Constable Benavides and Deputy Sheriff Ellert verified the fact that Nelson did make that threat. (Tr. Vol. III p. 691). This was another example of the strikers trying to intimidate law enforcement officers either by force of numbers or by threats; however, the Texas Rangers refused to be intimidated.

On May 17, 1967, Juan Vela was driving a truck load of workers into a Trophy Farm when he was stopped by picketers at the gate. After talking to the picketers they told him it would be all right to go on in that day, but not to come back the next day because they would not let him in. (Tr. Vol. II p. 476). On the 18th they would not allow him or his crew to enter. There were obscenities used against him and his crew. Onas Brand, the farm manager of the Trophy Farms, filed a complaint and the Texas

Rangers made the arrests. Captain Allee said that pickets were bunched up together and interfering with traffic and interfering with free ingress and egress to Trophy Farm. (See Answer to Plaintiffs' Interrogatory No. 70).

The picketing was accompanied by destruction of property of the Missouri Pacific Railroad. Although not a party to this feud, the Missouri Pacific Railroad Company suffered partial destruction of a bridge by arson, found that objects had been placed on railroad tracks which could derail trains, had rocks thrown at trains, and other incidents which endangered the operation of the railroad to such an extent that they found it necessary to keep a number of special agents on hand to attempt to protect railroad property and in addition to ask assistance from the Texas Rangers in order to secure the safety of their trains. (Tr. Vol. III p. 695-696).

On May 26, 1967, fourteen union sympathizers were arrested in two groups at Mission, Texas. Mission, Texas, is in another county approximately forty miles from the scene of the other disruptions. The union members attempted to picket and interfere with the operation of the Missouri Pacific Railroad.

The record reflects that because of various acts of sabatoge, Rangers were riding the trains from Rio Grande City and that on occasions, a Ranger even accompanied a railroad special agent ahead of the train on a small motor car to see that there were no obstructions on the track which might derail the train. (Tr. Vol. IV p. 809).

On May 26, 1967, the union planned to disrupt traffic on the Missouri Pacific Railroads with the intent that none of the produce being shipped from the Starr County area

would be allowed to reach the market. This activity was directed against the Missouri Pacific Railroad and one of the main points of assembly was at Mission, Texas. The Press had notice of the planned activity and were present. Captain Allee stated that the picketers were standing on the track itself so that the locomotive would have had to run over them if they hadn't moved. (Tr. Vol. IV p. 811).

Members of the union were blocking railroad tracks. Some of the pickets had signs and some were without signs. A large crowd of spectators had gathered. Arrests were made by Texas Rangers at the request of railroad special agents. (Tr. Vol. IV p. 815-895).

The purpose of the blocking of the Missouri Pacific train was to keep the crew members from carrying on their occupation or employment by refusing to let them operate the train.

On May 31, 1967, there were pickets gathering on the road by the Solis' property at La Casita Farm. Pickets were using a loud speaker and calling the workers "son-of-a-bitch", and "mother-f_____". The testimony is uncontroverted that the workers in the fields had knives and the situation was very explosive. Pickets were placed under arrest and charged with violation of Article 5154d. (Tr. Vol. IV p. 799). It might likewise be pointed out that this statute in addition to being a mass picketing statute also contains a section prohibiting insults and abuse, or obscene or threatening language. In addition on this occasion, participants could have been charged with violation of Articles 439, 449, unlawful assembly; Article 474, disturbing the peace; and Article 42, abusive language; Articles 455, 464, or 466 or the rioting statute.

On June 1, 1967, Magdaleno Dimas was seen on more than one occasion in the vicinity of La Casita packing shed with a .22 rifle. He had previously threatened "to get" Jim Rochester, the manager of La Casita Farm, who was at the shed. Rochester was apparently terrified because of the reputation that Dimas had had for violence and demanded police protection. He threatened to call Washington if he could not get some relief from local state officers. (Tr. Vol. II p. 526).

Dimas was a known murderer, had cut a boy's throat from one ear to another "for the fun of it" and spent the year in jail for aggravated assault. He was accompanied by Benito Rodriquez, who also had a long police record, and was known by the officers to have committed crimes of violence. (Tr. Vol. IV p. 825). The Rangers attempted to obtain some assistance from the union in locating Dimas, but Chandler and Alex Moreno refused to help, pretending that they did not know the whereabouts of Dimas. The Rangers left, waited down the street, and Chandler led them directly to the hideout being used by Dimas. The evidence is uncontradicted that when Dimas came outside with Chandler he was still armed with a rifle, and Chandler, when the Rangers turned on their car lights, yelled to Dimas to throw his gun down. Dimas then ran back into the house. (Tr. Vol. IV p. 823). There is no denial that he is guilty of the crime with which he was charged. Benito Rodriquez was also guilty as a principal in accompanying Dimas in threatening and intimidating Jim Rochester, the manager of La Casita Farms. Dimas was a man of violence.

In making the arrests, Captain Allee admits hitting Dimas over the head with a shotgun. It might be observed that a less experienced officer would probably have shot

both Dimas and Rodriquez when Captain Allee found them inside the house with their hands under a table. (Tr. Vol. IV p. 827-828).

An examination of the above described incidents which form the basis of the complaint filed by Appellees reflect that the law enforcement officers and county officials have acted in good faith and in great moderation and restraint. Arrests occurred only when there was flagrant violations of the law, usually based on complaints made by the farm owners and in most instances, a lesser offense was charged, although the activities of the Appellees would have warranted more serious charges being filed. If more appropriate charges should have been filed under other statutes, we present that it was a mistake of judgment and not coupled with any intent to destroy the union. In any event, it is important to note that the Appellees flagrantly violated the laws of the State of Texas on many, many occasions. The officials involved, as well as the Texas Rangers, were sworn to uphold the law as a part of their official duties.

SUMMARY OF THE ARGUMENT

The court below incorrectly found that Article 5154d of Vernon's Civil Statutes of the State of Texas (prohibiting "mass picketing"), Sections 1 and 2 of Article 5154f of Vernon's Civil Statutes of the State of Texas, (prohibiting "secondary picketing", "secondary strikes", and "secondary boycotts"), as well as Articles 439, 474, 482, and 784 of the Texas Penal Code were unconstitutional for overbreadth under the First and Fourteenth Amendments of the Constitution of the United States.

The statutes involved in no way prohibit or restrict

freedom of speech or petition. The statues involved seek to regulate conduct utilized to further the ends of speech and expression.

Appellants submit that injunctive relief was not proper under the facts and circumstances as appear herein. It should not be presumed that the state courts will not accord Appellees their full federal and state constitutional rights in state court trials. It must be presumed that the state courts will construe the various state statutes involved and apply them with keeping with constitutional principles, and the court below should have assumed that the state courts would do so properly.

ARGUMENT AND AUTHORITIES

ARTICLE 5154d, SECTION 1 OF THE REVISED CIVIL STATUTES OF TEXAS, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The State of Texas, through the Legislature, has enacted statutes regulating labor. These are grouped together in Title 83 of the Texas Civil Statutes, entitled Labor. Chapter Two of that title contains provisions relating to Labor Organizations, and sets forth their rights and privileges, and limitations upon the activities they may lawfully pursue. It is in this scheme of regulation of labor organizations that the challenged mass picketing statute, Article 5154d, Section 1, Vernon's Annotated Civil Statutes, is to be found. That statute is an exercise of the State's legitimate interest in regulating labor disputes, and must be examined in light of that fact. Nothing could confuse the issue more than to approach this statute with

the misconception that it applies to so-called "public-issue picketing."

Section 1 of Article 5154d prohibits "mass picketing" as therein defined. It further provides:

> "The term 'picket', as used in this Act, shall include any person *stationed by or acting for and in behalf of any organization* for the purpose of . . . "

It is clear from the context of this statute in the chapter on Labor Organizations, and from the other statutes of that chapter, that the words "any organization" refer to labor organizations. Just as other statutes in that chapter regulate labor organizations (see, e.g. Article 5154d, V.A.C.S.), the challenged provision is simply an additional exercise of the State's authority to regulate labor organizations. It is certainly no violation of the Fourteenth Amendment's Equal Protection Clause to enact statutes in pursuit of this legitimate legislative purpose. The fact that statutes regulating labor organizations do not address picketing by civil rights organizations or student organizations or consumer organizations is no more a denial of equal protection than the fact that statutes or regulations governing television advertising do not govern magazine advertising, or that statutes or regulations governing the advertising of tobacco products do not govern advertising of alcoholic beverages. Equal Protection does not require that all regulation be prescribed in the most general of terms: such a requirement would create a force in direct opposition to the due process requirements that laws avoid vagueness and overbreadth. What could be more vague and broad than the prohibition of misleading labelling and advertising, and yet what could be narrower in application and subject to false claims of denial of equal protection

than specific regulations thereunder applicable only to one of several closely related industries or products. The challenged statute is part of a system of regulation of labor organizations, and the prohibition of mass picketing by such organizations is the regulation of their conduct fully within the police power of the State to regulate labor organizations. That this statute regulating labor organizations does not address mass picketing by others is clearly not a denial of equal protection.

ARTICLE 5154d, SECTION 1, OF THE REVISED CIVIL STATUTES OF TEXAS, IS NOT UNCONSTITUTIONAL BECAUSE OF IMPERMISSIBLE BROADNESS.

Article 5154d, Section 1, prohibits mass picketing as a practice available to labor organizations, and defines mass picketing as follows:

> " 'Mass picketing', as that term is used herein, shall mean any form of picketing in which:
>
> 1. There are more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets.
>
> 2. Pickets constitute or form any character of obstacle to the free ingress to and egress from any entrance to any premises being picketed or to any other premises, either by obstructing said free ingress or egress by their persons or by the placing of vehicles or other physical obstructions."

Article 5154d prohibits "mass" picketing. It was designed to prevent the massing of pickets and the regulation

of picketing activities without prohibiting them. Pickets were prevented from physically obstructing ingress and egress to any premises, but were allowed to have sufficient number, in the opinion of the Legislature, to convey the message that the premises in question were being picketed and the reasons for the dispute.

The State has long been recognized to have the right to regulate picketing but not to prohibit it. See *Thornhill v. Alabama*, 310 U.S. 88. 60 S.Ct. 736; *Building Service Employees International Union Local 262 v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784; *Gibony v. Empire Storage and Ice Co.*, 336 U.S. 490, 69 S.Ct. 684; *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl*, 315 U.S. 769, 62 S.Ct. 816; *Carpenters and Joiners Union, Etc. v. Ritters Cafe*, 315 U.S. 722, 62 S.Ct. 807; *Milkwagon Drivers Union, etc. v. Meadowmoore Dairies*, 312 U.S. 61 S.Ct. 552; *International Union of Operating Engineers v. Cox*, 219 S.W.2d 787 and *Geissler v. Coussoulis*, 424 S.W.2d 709. Constitutional guarantees of freedom of speech do not grant an unabridged license to engage in any type activity because a part of such activity is a dissemination of ideas. Mr. Justice Black stated in *Gibony, et al v. Empire Storage and Ice Company*, supra, page 502:

> "But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

The court below held each of these two definitions of mass picketing unconstitutionally overbroad. Appellants assert that that court erred and that neither definition is unconstitutional. The court below began its analysis of this

statute on the wrong foot when it declared that this statute regulated "public issue picketing", when in truth it regulates labor organization conduct, as demonstrated above.

The district court then proceeded to dispense with the first definition of mass picketing by comparison with the Louisiana Municipal Ordinance held unconstitutional in *Davis v. Francois*, 395 F.2d 731 (5th Cir. 1968). That case and ordinance are clearly distinguishable from the instant case and statute. As the Fifth Circuit noted in its opinion, the Louisiana ordinance restricted "public issue picketing". In contrast, the Texas statute regulates the conduct of labor organizations only, as clearly demonstrated in the discussion of equal protection claims above. Contrary to the conclusion of the district court, the Texas statute strikes a permissible balance "between the constitutional protection of the element of communication in picketing and '. . . the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama*, 310 U.S. 88, 104." *Teamsters, Local 309 v. Hanke*, 339 U.S. 470, 475 (1950).

The so-called numbers and distance formula of Article 5154d is not unconstitutional and does not suffer the defects which made the Louisiana ordinance unconstitutional, as held in *Davis v. Francois*, supra. That Louisiana ordinance violated constitutional requirements most seriously in that "it absolutely limits the number of picketers to two regardless of the time, place or circumstances." *Davis*, supra, at 735. Unlike that ordinance, the Texas statute has a built-in adjustment formula which allows more pickets in proportion to the size of the premises being picketed and the number of entrances. The Texas formula allows pickets to march in pairs at fifty foot

intervals, and allows picketing in pairs at sufficiently spaced entrances. It is thus clear that the numbers and distance formula of Article 5154d is not an absolute straightjacket, but instead it is a true formula which permits greater or fewer pickets according to the circumstances of the particular case. This formula is based on the State's reasonable judgment balancing "the constitutional protection of the element of communication in picketing" during labor disputes, and the need to "set the limits of permissible contest open to industrial combatants," (see *Hanke*, supra).

In *Cox v. Louisiana*, 379 U.S. 559, at 564, Mr. Goldberg stated that the statute in question is:

> "... a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and ... the fact that free speech as intermingled with such conduct does not bring with it constitutional protection."

The Legislature of the State of Texas has the duty of protecting the public of this State against unlawful conduct and in safeguarding the tranquility of its inhabitants. In exercising its discretion in this regard, the Legislature concluded that the idea sought to be disseminated could clearly be projected by not more than two pickets located within fifty feet of any entrance of the premises being picketed or within fifty feet of each other. Unless it is the intent of pickets to intimidate, the public can be made legally aware of grievances sought to be corrected within the limits of the picketing permitted by the Statute. Courts of other states have not been reluctant to limit the number of pickets allowable. See *Rice & Holman v. United Electrical Workers*, 65 A.2d 638 (New

Jersey Superior Ct. 1949); *Standard Appliances v. Korman*, 111 N.Y.S. 2d 783, 786 (New York S.Ct. 1952); *Tarrytown Road Restaurant, Inc. v. Hotel and Restaurant Employees*, 115 N.Y.S. 2d 626, 631 (New York S.Ct. 1952); *Sternfair Corporation v. Moving Pictures Operators*, 139 N.Y.S.2d 145, 150 (New York S.Ct. 1955); *Ballas Egg Products Company, Inc. v. Meat Cutters*, 160 N.E.2d 164 (Ohio Ct.Com.Pls. 1959).

The first mass picketing definition of Section I of Article 5154d is a valid exercise of legislative discretion under its inherent police power to regulate labor disputes. We therefore contend that it is constitutional in every respect.

Turning now to the second mass picketing definition in the statute under discussion, Appellants contend that the district court erred in holding it unconstitutional, and assert that it is in all respects constitutional.

In *Cameron v. Johnson*, 390 U.S. 611 (1968), this Court upheld a Mississippi statute which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress . . . " (390 U.S. at 616). In contrast, the Texas statute only prohibits pickets which constitute an actual obstacle "either by obstructing said free ingress or egress by their persons or by the placing of vehicles or other physical obstructions". The Texas statute is therefore clearly narrower in scope than the Mississippi statute, and this Court's decision in *Cameron* dictates that the Texas definition be held valid.

The district court misread the Texas statute as well as Cameron's construction of the Mississippi statutes when it attempted to distinguish the instant case from *Cameron*.

Contrary to the district court's interpretation, the Texas statute only prohibits actual physical obstruction, whereas the Mississippi statute upheld in *Cameron* prohibited not only actual obstructions, but also any unreasonable interference with free ingress or egresss. Indeed, in *Geissler v. Coussoulis*, 424 S.W.2d 709 (Tex.Civ.App. San Antonio, 1967, writ ref'd n.r.e.) the court interpreted this definition of mass picketing as prohibiting only actual physical obstructions. With this state court interpretation and the clear language of the statute, this Court's opinion in *Cameron* dictates the conclusion that the second definition of mass picketing in Article 5154d, Section 1, is a valid exercise of the police power to regulate conduct in labor disputes of the State of Texas. We therefore contend that it is constitutional in every respect.

ARTICLE 5154f OF THE REVISED CIVIL STATUTES OF TEXAS IS NOT UNCONSTITUTIONAL BECAUSE OF IMPERMISSIBLE BROADNESS.

Article 5154f of the Revised Civil Statutes of Texas prohibits secondary picketing, secondary strikes, and secondary boycotts. It carefully defines the terms used in the act and specifically delineates those actions prohibited. The right of the State to adopt such policy is well settled.

This Honorable Court in *Carpenters & Joiners Union of America, et al, v. Ritter's Cafe, et al*, 315 U.S. 722, 728 (1942) stated as follows:

> "In forbidding such conscription of neutrals, in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital

constitutional liberties into doctrinaire dogma. We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama*, 310 U.S. 88, 103-04.

"It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law."

In that case it was held that the Texas Anti-Trust Laws could be applied to secondary picketing. Rather than rely on the generalities of the Anti-Trust Laws the Texas Legislature spoke specifically to this problem in 1947, adopting the statute here challenged.

Although the Texas Supreme Court has held that the definition of "labor dispute" contained in the statute creates an unconstitutional restraint upon free speech and communication, it by no means has stricken the remaining portions of the statute. Indeed, that court has recognized the continued validity of Article 5154f, wherein only that portion of the definition of "labor dispute" which offends the Constitution has been stricken:

"Picketing of Wamix was not in violation of Article 5154f, V.A.T.S. Wamix states in its brief that it is undisputed that the strike was called 'for the purpose of forcing plaintiff to make wage concessions.' That

was a lawful objective and created a valid labor dispute, both as defined in Section 2, subd. h of Article 5154f and at common law. It was immaterial to the right to picket Wamix that only a minority of its employers engaged in the picketing or that those picketing had been discharged from their employment. International Union, etc. v. Cox, 148 Tex. 42, 219 S.W.2d 787."

Dallas General Drivers v. Wamix, 295 S.W.2d 873, 881 (1956). The above language makes it abundantly clear that the Supreme Court of Texas regards Article 5154f as a viable statute still in force, except to that extent to which the definition of "labor dispute" had been stricken.

In the earlier Texas Supreme Court decision cited in *Wamix*, that court was explicit in stating the extent to which it was striking down a portion of the statutory definition of "labor dispute". In 1949 that court held:

> "As reluctant as we are to declare acts of our Legislature unconstitutional, it becomes our duty to declare invalid that portion of the statute involved which seeks to restrict a "labor dispute" to a controversy between an employer and a majority of his employees."

International Union of Operating Engineers v. Cox, 219 S.W.2d 787, 794. It is obvious that the Texas Supreme Court was invalidating only a portion of the definition of "labor dispute"; it was not striking down the entirety of Article 5154f, nor even the entirety of the statutory definition of "labor dispute". In so doing, that court was following well established rules of statutory interpretation and the mandate of Section 8 of Article 5154f, which provides:

"If any section, sentence, phrase or part of this Act shall be held unconstitutional, such unconstitutionality shall not affect the validity of the remaining portions thereof; . . ."

It is the position of Appellants that Article 5154f, as interpreted by the highest State court, is a valid and constitutional exercise of "the power of the State to set the limits of permissible contest open to industrial combatants," *Thornhill v. Alabama*, 310 U.S. 88, 104.

The three-judge district court held Article 5154f unconstitutional in its analysis of the three operative concepts defined in §2, to wit: 2(d) "secondary picketing" 2(b) "secondary strike" and 2(e) "secondary boycott". We will discuss the definitions in this order, following that of the analysis of the court below.

Section 2(d) defines "secondary picketing" as "the act of establishing a picket or pickets at or near the premises of any employer where no labor dispute . . . exists between such employer and his employees". The rationale of the court below in finding this definition overbroad is "It clearly relies on the absence of an employer-employee relationship and this is impermissible" (347 F. Supp. at 627) under the case of *American Federation of Labor v. Swing*, 312 U.S. 321 (1941). The definition of secondary picketing, however, does not turn exclusively upon the absence of an employer-employee relationship: essential to the definition in 2(d) is the definition of "picket" set forth in 2(c), and completely ignored by the district court in its analysis. Certainly it is not the absence of an employer-employee relationship wherever found that is impermissible: if so no secondary picketing prohibition could be valid. It is the reliance of a statute exclusively upon the

absence of such relationship which is impermissible. The Texas statute requires that the absence of this relationship be accompanied by the two limiting factors set forth in 2(c): the conduct be in behalf of a labor organization, and the picketing be for one of the express purposes enumerated in 2(c). With regard to the first limiting factor, see argument on the equal protection issue above.

With regard to the second limiting factor, this Court stated in *International Brotherhood of Teamsters v. Vogt*, 354 U.S. 284, 293 (1957), after reviewing the development of the law in this area:

> "*This series of cases, then, established a broad field in which a State*, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, *could constitutionally enjoin peaceful picketing* aimed at preventing effectuation of that policy." (Emphasis added.)

The enumerated purposes set out clearly and precisely in the 2(c) definition of "picket" are statements of public policy, the enforcement of which is sought by this statutory prohibition of secondary picketing made in full conformity with the *Vogt* doctrine announced by this Court.

The rationale of the court below in invalidating the §2(b) definition of "secondary strike" is wholly inadequate even if accepted as accurate, which it is not. On the basis of the "aid or abet" clause of §1, the court ruled all of §2(b) unconstitutionally overbroad because of possible inclusion of protecting picketing. Even if this reasoning were sound it would at most justify holding the "aid or

abet" clause invalid as applied to §2(b). However the reasoning itself is fundamentally unsound. Any picketing which would constitute aiding and abetting a secondary strike can be constitutionally prohibited by the Texas statute under the above quoted doctrine announced in *Vogt*. Prohibition of secondary strikes is certainly within the area of permissible state public policy, and *Vogt* expressly permits prohibition of picketing "aimed at preventing effectuation of that policy".

Turning now to the §2(e) definition of "secondary boycott", it is clear that the court below ignored the plain language of the statute, and the legislative scheme therein established. The court relied upon the "aid or abet" argument which Appellants have refuted in their discussion of §2(b) above. As shown there, the rationale of the district court is inadequate in light of *International Brotherhood of Teamsters v. Vogt*, supra, wherein this Court expressly recognized the power of the State constitutionally to enjoin even *peaceful* picketing when such picketing is aimed at preventing effectuation of a permissible public policy.

The district court placed the cart before the horse when it reasoned first that Texas had prohibited second boycott picketing, second that such picketing is constitutionally protected, and then concluded therefrom that the entire secondary boycott prohibition is invalid. The doctrine of *Vogt* requires that the prohibition of secondary boycott picketing be condemned *only if* the prohibition of the secondary boycott first be held an impermissible public policy. The district court, however, did not even consider the question of the validity of the State's public policy against secondary boycotts, beyond its wholly inaccurate observation: "The evil here is 'damage or injury' of any

character or degree no matter how slight or subtle." 347 F.Supp. at 628. The court appears to have ignored the greater portion of §2(e) which sets forth in detail the specific manner by which the damage or injury must be inflicted, each of which constitutes a statement of legitimate public policy sought to be protected by this legislative enactment. It is the contention of Appellants that these limiting clauses of §2(e) spell out specifically the state public policy prohibiting secondary boycotts, and that as such, the State may also prohibit picketing aimed at preventing effectuation of that policy, in accordance with the *Vogt* doctrine.

It is therefore clear that the rationale of the court below is inadequate to support its ruling of unconstitutionality with respect to Article 5154f, and furthermore that the reasoning of the court below is in error even to that limited extent to which it would hold minimal portions of that statute unconstitutional. Article 5154f is clear and concise and is a valid exercise of legislative discretion under its inherent police power. We therefore contend that it is constitutional in every respect.

ARTICLE 482 OF THE TEXAS PENAL CODE IS NOT UNCONSTITUTIONAL FOR OVER BREADTH.

Article 482 provides as follows:

> "Any person who shall in the presence of hearing of another curse or abuse such person, or use any violently abusive language to such person concerning him or any of his female relatives, under circumstances reasonably calculated to provoke a breach of the peace, shall be fined not more than one hundred dollars."

This Honorable Court in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), had before it for interpretation the New Hampshire abusive language statute. There this Court stated at page 571:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut*, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352."

That Article 482 of the Texas Penal Code which prohibits the use of abusive language is constitutional is settled by this unanimous decision in *Chaplinsky*, supra, upholding a statute with a similar purpose but couched in far more general terms. See also the Arkansas statute, very similar in its language to this Texas statute, noted approvingly by this Honorable Court in *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 138 n. 5 (1957).

ARTICLE 439 OF THE TEXAS PENAL CODE IS NOT UNCONSTITUTIONAL.

Article 439 reads as follows:

"An 'unlawful assembly' is the meeting of three or more persons with intent to aid each other by violence or in any manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof."

Article 449 reads as follows:

"If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine not exceeding five hundred dollars."

If Article 439 stood alone it might be subject to challenge on grounds of unconstitutional indefiniteness, though even that challenge probably would fail. Insofar as it makes it criminal for three or more persons to aid each other "to commit an offense" it is merely a conspiracy statute. Cf. 18 U.S.C. Section 371. It also prohibits such an assembly "illegally to deprive any person of any right" the reference to the rights that are protected is surely not specific, though it is relevant to note that 18 U.S.C. Section 242, making it criminal to deprive any person "of any rights, privileges or immunities secured or protected by the Constitution or Laws of the United States", has been upheld against challenge on the ground of vagueness. *Williams v. United States*, 341 U.S. 97, 100-101 (1951). The word "illegally" may well be the key, since it is not a

conspiracy to deprive a person of a right that is prohibited, but only a conspiracy illegally to deprive him of a right. Thus this portion of the statute makes criminal a conspiracy to do something that the law of the State, including the civil statutes and the common law, prohibits.

For the purposes to this case Article 439 must be read together with Article 449. Taking these statutes together, as the Texas courts have consistently done, they say:

> "An 'unlawful assembly' is the meeting of three or more persons with intent to aid each other by violence or in any other manner . . . to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another . . . "

This expresses in words of common understanding the kind of conduct by a group of persons that is prohibited by the statute. The notion that a group of persons have a constitutional right to prevent someone else from working at his employment is hardly likely to be the law. The Texas Court of Criminal Appeals has given these statutes very narrow interpretations and required that the indictments set out in detail the matter with which the persons are actually charged. For example, *Blackwell v. State*, 18 S.W. 676, the court said that if the indictment or information throughout did not show for what purpose the rioters assembled, the information was insufficient. In the case of *Follis v. State*, 40 S.W. 277, it was held that an indictment for unlawful assembly to prevent a party by violence from having a social gathering or dance at his house should allege that such party has a house and was giving or about to give a social gathering or dance. In *Luter*

v. State, 22 S.W. 140, the court held information was defective under Article 449 for failure to set forth the nature of the "unlawful employment".

In *Briscoe v. State*, (1961), 341 S.W.2d 432, the indictment was held defective because there was no notice as to whether the State would rely on intent by violence to disturb the victim and deprive him of his right to operate a lunch counter or would rely on proof on an intent to deprive him of such right by some means other than by the use of violence. The attention of the Court is also directed to *Tucker v. State*, (1961), 341 S.W.2d 433, and *Johnson v. State*, (1961), 341 S.W.2d 434. Likewise in *Jones v. State*, (1962), 355 S.W.2d 727, the mere attempt to procure service at a railroad terminal without an act of violence or other violation of the law would not justify conviction.

We recognize that the right of lawful assembly is constitutionally protected. The statute is not directed at a lawful assembly, but at the unlawful one which is not constitutionally protected. See *Cox v. Louisiana*, 379 U.S. 559. It is well settled that courts are inclined to adopt that reasonable interpretation of a statute which moves it furthest from possible constitutional infirmity. *Kovacs v. Copper*, 336 U.S. 77 (1948); *Cox v. Louisiana*, supra. It has likewise been held that even a lawful assembly is subject to State regulation. *Poulos v. State of New Hampshire*, 345 U.S. 395 (1953). In the latter case the court stated at page 405:

> "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or

> instruction . . . it has indicated approval of reasonable non-discriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of First Amendment guarantees of free speech, press, and the exercise of religion. When considering specifically the regulation of the use of public parks, this court has taken the same position."

In the case of *Hughes, et al v. Superior Court of California*, 339 U.S. 460 (1950), the court held that industrial picketing was subject to the control of a state if the manner in which the picketing was conducted or the purpose which it seeks to effectuate gives ground for its disallowance. The court, however held:

> "It has been amply recognized that picketing, not being the equivalent of free speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond control of a State if the manner in which the picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."

See cases cited therein at page 466.

Texas has a "right to work law". Article 5207a, Vernon's Annotated Statutes, and similar statues have been held constitutional by the Texas and the United States Supreme Courts. *Construction and General Labor Union v. Stephenson*, (Tex.Sup. 1950) 225 S.W.2d 958, *Building Service Employees Union, etc. v. Gazzan*, supra. To hold that the right to work law is constitutional and to hold that the State cannot declare illegal an assembly whose purpose is to prevent a person from pursuing his labor, occupation, or employment or intimidate him from following his daily avocation or to interfere in any manner

with the labor or employment of another would make the right to work statute meaningless.

We submit that the statute in question is not unconstitutional for over breadth as the court below found.

THE COURT BELOW IMPROPERLY ORDERED INJUNCTIVE RELIEF AGAINST PEACE OFFICERS OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY AND THE LAW ENFORCEMENT OFFICERS OF STARR COUNTY IN THIS CASE WHERE PROSECUTIONS WERE PENDING IN THE STATE COURTS.

The effect of the holding in the court below was to require federal intervention and to threaten state prosecutions. The order of the court coupled with the injunction, prevents enforcement of the statutes, either by criminal complaint or civil petition, regardless of the peaceful or non-peaceful nature of the picketing activities.

The witnesses presented by Appellees in defense of their position and their contentions that the criminal charges pending against them were maliciously filed are supported only by the testimony of those who are charged with the commission of the crime. The case was brought about as an effort on the part of the Appellee to kill charges pending against them in state court by federal intervention rather than by allowing a jury of their peers to determine the questions of guilt or innocence as is provided by the Constitution of the United States and the State of Texas. It is important to note in this case that Appellees have not contended that the Appellants in the future will attempt to again institute proceedings against them under void statutes or because they wish to harass Appellees by filing

charges with no expectations of obtaining convictions. The record reflects a very good basis for Appellees not advancing this theory. The president of the Farm Workers Union, Domingo Arredondo, one of the Appellees herein, frankly states that picketing continued until it was stopped by injunction. It was not the arrest that "chilled" Appellees' alleged constitutional right and destroyed the strike. Unless and until the existing injunction is dissolved or the case reversed on appeal, Appellees cannot engage in further picketing as prior picketing was found to be "coupled with violence".

There have been no arrests or threatened arrests of any of the Appellees by any of the Appellants since the institution of this lawsuit which is approximately during a period of four years.

The Three-Judge Court below relied on *Dombrowski v. Pfister*, 380 U.S. 479, 482-485 (1965), supra, as authority for entering the arena of state prosecution at the early stages. This reliance apparently ignored the decision of this Court in *Cameron v. Johnson*, 390 U.S. 617 (1968).

Any notion that *Dombrowski*, supra, had opened wide the door to federal court intervention was dispelled in *Cameron*, supra. In *Dombrowski*, supra, the court there pointed out that the statutes challenged regulated "expression itself", rather than, as in *Cameron*, supra, statutes regulating "conduct which is intertwined with expression". In this respect our case is like *Cameron* and unlike *Dombrowski*.

The court below misapplied *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* holds that federal courts may not enjoin pending state court criminal prosecution unless the

applicant makes a showing of irreparable harm which is both great and immediate. Disclaiming any intent to catalogue exhaustively the situations where irreparable harm can be said to exist, this court in *Younger* did, however, discuss two fact circumstances which would justify federal court intervention. First, an injunction would be granted by the federal district court to prevent a prosecution undertaken for a purpose of harassment and in bad faith without any expectations of securing a valid conviction. Secondly, the court suggested that, even in the absence of the usual requisites of bad faith and harassment, a "statute might be (so) flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whom ever an effort might be made to apply it," that federal injunctive relief would be available to prevent attempts to prosecute under it. In any case, the harm required to be shown must be comparable to the harm present in the situation described by the court. *Younger* also holds that the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution cannot, by itself, be considered irreparable damage, as that term was used by the court.

The evidence does not reflect that either the Starr County officials or the Texas Rangers, in attempting to enforce the statutes in question knew or had cause to believe that any particular statute was unconstitutional. Certainly, in the absence of any state court holding any of these statutes to be unconstitutional prior to the time of the arrest of the Appellees during the strike, the law enforcement officers, the group from Starr County as well as the Texas Rangers, who are not versed in constitutional law cannot be expected to know that such statute might be later struck down in federal court.

In the court below Appellees claimed that the officials of Starr County and the Texas Rangers were biased and merely arrested the Appellees to destroy the union. This contention is utterly ridiculous. Even if the officers had hoped to stop union activity, which is untrue, the president of the union testified that picketing continued until the union was enjoined in state court from further picketing because the picketing had been coupled with actual violence.

Members of the union are not above the law merely because of the union membership. The testimony by the various defendants clearly proves that violations of law had occurred prior to each arrest. Appellees' position below was that the law enforcement officers were attempting to destroy the union by arrests on one hand and by criticizing the law enforcement officers for not filing complaints on various other offenses and contending that this action of the law enforcement officials indicated that Appellees were not violating other statutes. Certainly if the law enforcement officials were attempting to destroy the union by arrests, arrests would have been made almost daily as the picketing occurred daily. In addition, complaints could have been filed against those arrested under every possible statute where charges could be brought. The true inference to be drawn from the facts that other charges were not filed was that the officers, at the time the arrests were made, were merely trying to uphold the laws of the State of Texas and preserve the peace.

It is submitted that injunctive relief was not proper under the facts and circumstances as revealed above. It could not be presumed that the state courts will not accord defendants their full federal and state constitutional rights in state court trials. *Walker v. Birmingham*,

388 U.S. 307, 319 (1967); *Harris v. N.A.A.C.P.*, 360 U.S. 167 (1959). The mere possibility of an erroneous application of constitutional standards will not justify federal courts disrupting state proceedings. *Cameron v. Johnson*, supra; *Dombrowski v. Pfister*, supra. The state courts, presumably, would have construed the various statutes involved and applied them in keeping with constitutional principles, and the court below should have assumed that the state courts would do so.

"Principle of comity, of cooperation and of rapport between the two sovereigns," *Texas v. Payton*, 390 F.2d 261, 270 (5th Cir. 1968), strongly suggests that criminal law enforcement should be left to the states, and that except in the most extraordinary circumstances a federal court should not interfere by injunction with pending state proceedings. Deference by the federal courts to the states in this area recognizes that the "state court at least co-equal with federal courts in its duties and responsibilities in the administration of federal constitutional law." Id. at 272.

CONCLUSION

The Three-Judge Federal Court below incorrectly held Section I of Article 5154d, Section 1 and 2 of Article 5154f of Vernon's Civil Statutes and Articles 482 and 439 of the Texas Penal Code to be unconstitutional for the reasons given above. Furthermore, whether these statutes be constitutional or unconstitutional, the court below erroneously, under the principles of federalism, enjoined state officials from enforcing the statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Appellants' Brief has been served on counsel for the Appellees by depositing same in the United States Mail, certified, postage prepaid, addressed to Mr. Chris Dixie, Attorney at Law, 609 Fannin Street Building, Suite 401, Houston, Texas 77002, on this the _____ day of June. 1973.

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